

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
March 26, 2012 Session

JEFF KING v. GERDAU AMERISTEEL US, INC.

**Appeal from the Chancery Court for Madison County
No. 67180 James F. Butler, Chancellor**

No. W2011-01414-WC-R3-WC - Mailed June 25, 2012; Filed July 30, 2012

An injured employee returned to work for his pre-injury employer. The employee was moved to a different area and worked fewer overtime hours because of his medical restrictions. The trial court held that the employee did not have a meaningful return to work pursuant to Tennessee Code Annotated section 50-6-241(d)(1)(A) (2008) and awarded permanent partial disability benefits in excess of one and one-half times the anatomical impairment. The employer appealed. We hold that the employee had a meaningful return to work and that Tennessee Code Annotated section 50-6-241(d)(1)(A) limits the employee's recovery to one and one-half times the anatomical impairment. We therefore modify the judgment of the trial court.

**Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right;
Judgment of the Chancery Court Modified; Case Remanded**

DONALD P. HARRIS, SP. J., delivered the opinion of the Court, in which JANICE M. HOLDER, J., and TONY A. CHILDRESS, SP. J., joined.

Michael L. Mansfield, Jackson, Tennessee, for the appellant, Gerdau Ameristeel US, Inc.

Spencer R. Barnes, Jackson, Tennessee, for the appellee, Jeff King.

MEMORANDUM OPINION

Factual and Procedural Background

Gerdau Ameristeel US, Inc. ("Ameristeel") employed Jeff King as a maintenance worker. Mr. King tripped over some debris at work and fractured his ankle on November 8, 2007. He was taken to a local emergency room, where he was examined and referred to Dr.

Kelly Pucek, an orthopaedic surgeon. Dr. Pucek initially treated the injury with a cast. When the fracture did not heal, Dr. Pucek performed surgery on Mr. King's ankle on November 27, 2007. Dr. Pucek later performed additional surgery to remove the hardware used in the initial surgery.

Although the fracture had healed by July 2008, Mr. King continued to have a higher level of pain than Dr. Pucek anticipated. For that reason, Dr. Pucek referred Mr. King to Dr. Andrew Murphy, a foot and ankle specialist. Dr. Murphy treated Mr. King from October 2008 until January 2010. During that period, Dr. Murphy ordered an MRI, a bone scan, and an EMG study of Mr. King's ankle. The results of these studies were generally normal. Dr. Murphy treated Mr. King with cortisone injections and bracing. Dr. Murphy determined that Mr. King reached maximum medical improvement in March 2009 and ordered a functional capacity evaluation. Based upon the results of this evaluation, Dr. Murphy determined that Mr. King was able to work for seven to eight hours per day, to sit for seven to eight hours, to stand for one to two hours in fifteen-minute durations, and to walk for one to two hours for short distances. In Dr. Murphy's opinion, Mr. King retained a 20% anatomical impairment to the right leg.

Mr. King filed a request for a benefit review conference, which was held on July 9, 2010. After the conference reached an impasse, Mr. King filed a complaint seeking workers' compensation benefits in the Chancery Court for Madison County, Tennessee. A trial was held on May 9, 2011.

Prior to his injury, Mr. King had worked in an area known at the "mill shop."¹ Maintenance workers in that area typically worked twelve-hour shifts for four days during one week and for three days during the next week. Payroll records for the two years prior to Mr. King's injury showed that he had averaged fifty hours of work per week during that period. As a result of the eight-hour workday limit imposed by Dr. Murphy, Mr. King was transferred to an area known as the "central shop" where maintenance workers normally worked five eight-hour shifts per week. His hourly rate of pay was the same as it had been prior to the injury. Mr. King testified that he had been offered three opportunities to work overtime since being assigned to the central shop. Kevin Arnett, Ameristeel's safety manager, testified that central shop employees normally had more opportunity to work overtime than mill shop employees but that overtime work for all employees, plant-wide, had been reduced due to economic conditions.

At the time of trial, Mr. King was forty-nine years old, was a high school graduate, and held several welding certifications. He began working for Ameristeel in 1997. His

¹ At places in the transcript of the evidence, it is referred to as the "melt shop."

previous work experience had primarily been as a welder. He testified that he wore a brace on his leg “all the time” and was able to stand for only two hours before his leg pain required him to sit. Mr. King had given up golf and had reduced the number of fishing tournaments in which he participated due to his leg pain.

The trial court found that the eight-hour workday limitation placed upon Mr. King had reduced his ability to work overtime. On that basis, the trial court found that Mr. King did not have a meaningful return to work and that the award of disability benefits was not limited to one and one-half times the impairment rating pursuant to Tennessee Code Annotated section 50-6-241(d)(1)(A) (2008). The trial court determined that Mr. King had sustained a 60% permanent partial disability to his right leg. Judgment was entered in accordance with the court’s findings. Ameristeel appealed, asserting that the trial court erred by finding that Mr. King did not have a meaningful return to work. The appeal was referred to a Special Workers’ Compensation Appeals Panel. Tenn. Sup. Ct. R. 51 § 1.

Standard of Review

The material facts in this case are undisputed. Accordingly, this appeal presents only questions of law. A trial court’s conclusions of law are reviewed de novo upon the record with no presumption of correctness. Excel Polymers, LLC v. Broyles, 302 S.W.3d 268, 271 (Tenn. 2009); Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009) (“The interpretation of a statute and its application to undisputed facts involve questions of law.”).

Analysis

Ameristeel contends that Mr. King had a meaningful return to work for purposes of Tennessee Code Annotated section 50-6-241(d)(1)(A), which limits a permanent partial disability award to one and one-half times the anatomical impairment caused by a compensable injury when “the pre-injury employer returns the employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of the injury.” Because Mr. King returned to work at Ameristeel, the issue in this case is whether his wages are equal to or greater than the wages he was receiving at the time of the injury. See Tenn. Code Ann. § 50-6-241(d)(1)(A).

The definition of the term “wage” as used in Tennessee Code Annotated section 50-6-241 refers to the hourly rate of pay, not the average weekly wage received. Powell v. Blaylock Plumbing & Elec. & HVAC, Inc., 78 S.W.3d 893, 897 (Tenn. 2002), superseded by statute on other grounds, 2010 Tenn. Pub. Acts ch. 1034, secs. 1, 2. Although overtime wages may increase the average weekly wage received, overtime wages do not increase the

hourly rate of pay. Pratt v. Averitt Express, Inc., No. E2002-00864-WC-R3-CV, 2003 WL 358237, at *1 (Tenn. Workers' Comp. Panel Feb. 14, 2003).

It is undisputed that Mr. King was returned to work at the same hourly rate of pay that he received at the time of his injury. It is also undisputed that Mr. King is able to work a full, forty-hour work week. Although Mr. King has work restrictions that reduce the amount of overtime pay he receives, overtime pay contributes to his average weekly wage, not to his hourly rate of pay. We conclude that Mr. King has returned to work on a full-time basis at the same hourly rate of pay and has made a meaningful return to work.² His award is therefore limited to 30% permanent partial disability to the body as a whole, one and one-half times his impairment rating of 20%. See Tenn. Code Ann. § 50-6-241(d)(1)(A). We modify the judgment of the trial court and remand to the trial court for entry of a judgment consistent with this opinion.

Conclusion

The judgment is modified to award permanent partial disability benefits of 30% to the right leg, and the case is remanded to the trial court for further proceedings consistent with this opinion. Costs are taxed to the appellee, Jeff King, for which execution may issue if necessary.

DONALD P. HARRIS, SPECIAL JUDGE

² We observe, however, that even if an employee returns to work at the same hourly rate of pay, the cap on benefits in Tennessee Code Annotated section 50-6-241(d)(1)(A) may not apply if the employee is not able to return to work full time. See Powell, 78 S.W.3d at 898.

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JUDGMENT ORDER

This case is before the Court upon the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference;

Whereupon, it appears to the Court that the Memorandum Opinion of the Panel should be accepted and approved; and

It is, therefore, ordered that the Panel's findings of fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs on appeal are taxed to the Appellee, Jeff King, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM